IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2006 Session

STATE OF TENNESSEE v. DAMIEAN DEVON TOLSON

Direct Appeal from the Circuit Court for Lawrence County
No. 24282 Robert L. Jones, Judge

No. M2005-01085-CCA-R3-CD - Filed December 28, 2006

The defendant, Damiean Devon Tolson, was convicted of first-degree murder and was sentenced to life imprisonment. On appeal, he challenges: (1) the denial of his motion to suppress his statement to law enforcement; (2) the state's use of a peremptory challenge on an African-American prospective juror; (3) the under-representation of the African-American race in the jury pool; (4) the denial of his motion to preclude a witness's "prejudicial" testimony; (5) the sufficiency of the convicting evidence; and (6) the denial of his petition for writ of error coram nobis. Following our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA McGEE OGLE, JJ., joined.

Stanley K. Pierchoski, Lawrenceburg, Tennessee, for the appellant, Damiean Devon Tolson.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Mike Bottoms, District Attorney General; and Doug Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

On August 26, 2003, the defendant was indicted for the first-degree premeditated murder of Sherry Pogue. A hearing on the defendant's motion to suppress his statement to law enforcement was conducted on January 4, 2005, and the trial court denied that motion on January 10, 2005. A jury trial was conducted the 24th through the 26th of January 2005, from which we summarize the following testimony relevant to this appeal.

Brian Serrett testified that on July 29, 2003, he and Sherry Pogue, the victim, went to the North End Market in Lawrenceburg, Tennessee, to look for the defendant in hopes of "get[ting] some dope." Serrett did not know the defendant prior to this time, but the defendant and victim had evidently conducted business on previous occasions. As Serrett and the victim pulled into the market, the defendant approached the car and handed the victim several rocks of crack cocaine to which the victim responded that she could "do better than that in Mt. Pleasant." The defendant then got into the backseat of the car and said he needed to go to Mt. Pleasant to "[g]et some more dope." Serrett told the defendant that he was not going to Mt. Pleasant, but he could get the defendant some drugs around the corner.

Serrett testified that the defendant gave him $100 and the defendant and victim got out of the car. Serrett drove around the corner to Shirley and Sidney Richardson's house and asked a Jerry Collier to drive the car back to the market and tell the defendant and victim that Serrett had left. Collier delivered the car and returned to the Richardson house, and soon after the defendant and victim also arrived at the house. While the victim was still in her car, the defendant approached the house inquiring about his money. Serrett stepped out onto the front porch and told the defendant that it would be a minute.

Serrett recalled that Sidney Richardson went outside and started arguing with the defendant. Richardson followed the defendant out into the yard and the defendant picked up a plate and threw it at Richardson. The defendant got into the car with the victim and they drove away. Shirley Richardson took Serrett home and Serrett still had the defendant's money.

Geraldine Hicks testified that she was working at the North End Market on July 29, 2003. Hicks noticed that the victim came into the market around 8:30 p.m. and stood around for about ten minutes acting like she was waiting on someone. The victim paced around outside the market and eventually got into a car and left. Hicks remembered that the defendant was in the market at the same time as the victim, but she did not know if they had arrived together. Hicks stated that the market's policy was to close as close to 9:00 p.m. as possible.

Ronda Cathy testified that she was also working at the North End Market on July 29, 2003. Cathy saw the victim and the defendant in the market at the same time around 8:30 p.m., but the defendant left before the victim. The victim left the store about ten minutes after the defendant and got into the passenger seat of her car. The defendant was wearing a gray sweatshirt and blue jeans that night, which was not unusual for the defendant even though it was July.

Sidney Richardson, also known as Amber Brant,[1] testified that the victim was her cousin and on July 29, 2003, she saw the victim at the North End Market around 8:15 p.m. waiting for someone to return in her car to pick her up. Brant returned to her house and Serrett showed up about 8:30. After Serrett had been at her house for five minutes, the defendant showed up and asked Serrett

[1] Apparently, Sidney Richardson was born a male, but changed his sex and now goes by Amber Brant. Hereinafter, we will refer to Sidney Richardson as "Brant" or "Amber Brant."

about his money. The defendant left, then returned a few minutes later, and talked to Serrett around the side of the house. Apparently, the defendant wanted his money back and Serrett would not give it to him. Brant recalled that the defendant was mad and upset.

Brant testified that the defendant left again and came back a few minutes later with the victim in the victim's car. Brant recalled that Serrett had run out the back door of the house, and she approached the defendant and told him not to come back. The defendant told Brant that Serrett had told him that Brant and the victim had his money. The defendant said that "I bet I get my money, or I'll mess somebody up." The defendant and victim left the house between 8:45 and 9:00 p.m.

Brant testified that the defendant returned to her house around 9:15 p.m. in another car driven by one of the defendant's female relatives. The defendant told Brant that "he'd messed [her] cousin up, and to bring [her] butt out there and see if he don't pop [her]." Brant approached the defendant and the defendant reached in the car, got a plate, hit her on the side of the ear, and left.

On cross-examination, Brant admitted that she did not give a statement to police until nine days after the shooting because she was afraid if she talked to the police she would be arrested on outstanding probation violation warrants. Brant said that the defendant was wearing a white shirt and dark pants every time she saw him that night, except the time he pulled up and hit her with the plate when he was wearing darker clothes. Brant recalled that Serrett was driving the victim's car when she saw the victim at the North End Market around 8:15 p.m. waiting on someone to pick her up.

Cynthia Smith testified that she and a friend, Donna Oliver, were driving on Watson Drive during the late evening hours of July 29, 2003, when she saw a black car on the side of the road. When their headlights shined on the black car, a woman exited the driver's side and a man exited the passenger's side. The woman ran toward their vehicle "hollering, help me." Smith and Oliver traveled up the road approximately two miles and called 911 from a store at 8:55 p.m. Smith recognized the victim, having known her in school. Smith did not get a close look at the man's face, but she noticed he was African-American and estimated that he weighed 155 to 160 pounds, was about six feet tall, had broad shoulders, and was wearing black and red hightop shoes. When shown a red, black, and white shoe for identification, Smith stated that she did not remember seeing white on the man's shoes that night.

On cross-examination, Smith admitted that she did not give a description of the man to the 911 operator or to Investigator McConnell during her July 30th statement. Smith explained, however, that she did not give a description to Investigator McConnell the first time because she was scared. Smith stated that she gave a second statement to police, during which she described the man's shoes and said he was wearing a hooded top draped over his face. She also said that the man appeared to have short hair but she could not say for sure. In response to questioning, Smith acknowledged that she could not tell for sure that the man was African-American because he was wearing long pants and long sleeves with his face covered, but she assumed "[i]f it would have been a white man standing there, [she] could have seen some kind of . . . white."

Donna Oliver testified that she was in the vehicle with Cynthia Smith on the night in question. Oliver was driving and Smith was the passenger. Oliver recalled the events of that night similarly to Smith. Oliver stated that the man was a young African-American man, approximately five feet, eight inches tall, weighing 155 pounds, with medium length dark hair.

911 operator, Jennifer Ragaglia, testified that she received two calls regarding an incident on Watson Drive the evening of July 29, 2003. The first call was received at 8:55 p.m. and was from two women reporting that they had seen a car with two people in it, fighting. The second call was received at 8:59 p.m. and was from Martha Crosby reporting that a woman's throat had been cut. Ragaglia stated that another operator answered a call at 8:57 p.m. reporting that there was a female subject on Watson Drive with a gunshot wound or slashed throat.

Tammy Middleton testified that she saw a girl standing beside a car on Watson Drive the night of July 29, 2003, around 8:30 to 8:45 p.m. Middleton thought the girl had a flat tire so she stopped to help and noticed that the girl was covered in blood and had blood coming out of her nose. Middleton ran to a nearby house trailer, had the residents call 911, and returned to help the girl. The girl had money clinched in her hand.

Mary Johnson testified that she has known the defendant for a long time. Johnson remembered hearing about the victim getting shot but had no first-hand knowledge of the incident. Johnson saw the defendant a few days after the shooting riding his bicycle in town. When asked what was said when she stopped to talk to the defendant, Johnson replied,

> I asked him why did he kill the girl. I said, it's all over town that you did it. I heard you killed her. Why'd you do it? He said, f[]ck you. It's my sh[]t that come up missing. But he didn't kill her. That's what was said.

Johnson said that the defendant told her then and two days later that he did not kill the victim. On cross-examination, Johnson said that she asked the defendant the question in a teasing manner.

Thirteen-year-old Robert Oliver testified that the evening of July 29, 2003, he was on High Avenue playing with a friend, Fred Barnett, outside. Around 9:00 p.m., he saw someone run down Pine Bluff Road, turn onto High Avenue, stop under a street light and give him a mean look, then continue running. The individual was about seven feet away from him and he recognized the person as the defendant. Oliver knew the defendant fairly well prior to that night. He remembered hearing sirens all around at the same time he saw the defendant running. The defendant was wearing very baggy or loose bottoms. On cross-examination, Oliver admitted that he originally told Investigator McConnell that the person was wearing a white jersey with a number 36 on it and tan shorts.

Fourteen-year-old Fred Barnett testified similarly to Robert Oliver. In addition, Barnett heard gunshots before he saw a man running down Pine Bluff Road. Barnett did not know the man, but he described him as African-American with "puff things in his hair" and a little hair on his face.

Barnett picked the defendant out of a photographic array as the man he saw running that night and also pointed him out at trial.

Lawrence County Police Department Officer Parker Hardy testified that the defendant's aunt, Calandra McWilliams, lived eight-tenths of a mile from where the victim was parked on Watson Drive. Officer Hardy ran from the crime scene to McWilliams' house via a route on High Avenue and it took him six minutes.

Calandra McWilliams, the defendant's aunt, testified that on July 29, 2003, the defendant was living with her at her house. McWilliams arrived home a little after 8:00 p.m. and the defendant was on the porch. The defendant came inside the house about five or ten minutes later and asked McWilliams to take him to get something to eat. She recalled that they got into the car to leave at 9:03 p.m. McWilliams acknowledged that in the statement she gave Investigator McConnell she said that the defendant came inside her house at 9:00 p.m. wanting to get something to eat. McWilliams also acknowledged that she did not know where the defendant was between 8:00 and 9:00 p.m.

McWilliams testified that after she and the defendant got in the car at 9:03 p.m., she first took the defendant to Amber Brant's house before getting something to eat. McWilliams let the defendant out of the car at Brant's house while she turned around. She saw the defendant walking toward the car followed by Brant, and the defendant picked up a plate from her car and hit Brant on the head. The defendant got back into the car, and they went by the North End Market, but it had already closed so they went home. On cross-examination, McWilliams said that the clock in her car was five to ten minutes fast. McWilliams also said that the defendant was about six feet, three inches tall. McWilliams remembered hearing sirens nearby when they returned home.

Tennessee Bureau of Investigation Agent Elizabeth Reid testified that she examined the victim's car for fingerprints. Agent Reid found one of the defendant's fingerprints on the outside back passenger door of the vehicle. On cross-examination, Agent Reid stated that it was entirely possible for someone to be in a vehicle and not leave any identifiable latent fingerprints.

Investigator Samuel McConnell with the Lawrenceburg Police Department identified a bloody $10 bill found at the scene and the defendant's red, black, and white shoes that he confiscated from the defendant. Investigator McConnell recalled that the defendant admitted to wearing those shoes the night the victim was murdered. Investigator McConnell timed the drive from the scene of the shooting to Brant's house as taking two minutes and five seconds. He also timed the drive from the scene of the shooting to the country store where Oliver and Smith phoned 911 as taking one minute and forty-seven seconds.

Investigator McConnell questioned the defendant and the defendant denied being with the victim on Watson Drive on July 29, 2003. Investigator McConnell later went to the defendant's aunt's house to arrest the defendant and he caught the defendant trying to escape out of a window in the back of the house. Investigator McConnell then questioned the defendant a second time

during which he admitted being with the victim and Serrett at 8:00 p.m. He further stated that the victim and Serrett left together so he walked to Brant's house where he hit her with a plate and then went home. When asked, Investigator McConnell stated that he is six feet tall and said that the defendant reported his height and weight as six feet, one inch and 170 pounds, respectively.

Dr. Bruce Levy performed an autopsy on the victim and determined the cause of death to be a single gunshot wound to the face. The state then rested its case-in-chief, and the defendant put on the following proof.

Linda Brewer testified that she was in the area of Watson Drive the night in question and heard a gunshot. As she traveled on Watson Drive, she saw two cars on the side of the road and a girl standing with her head tilted over and covered in blood. Brewer called 911.

Gregory Cobbins, the defendant's uncle, testified that around 8:15 to 8:30 p.m. the defendant told him he was going to the store. About ten minutes later, Cobbins left the house to look for the defendant. Cobbins went to the North End Market and saw the victim while he was there. From the market, Cobbins could see the defendant at the nearby Richardson house talking with Amber Brant. Cobbins saw another individual leave the Richardson house and walk toward the market. The defendant then walked to the market and asked Cobbins for a ride home and Cobbins said no. The defendant then began walking and Cobbins followed him in the car. The defendant walked to an apartment building on May Street and went inside for three minutes, came back outside, jumped a ditch on the side of the road and went home. The defendant and Cobbins both arrived home around 8:48 p.m.[2] Cobbins saw the defendant leave with the defendant's aunt, Calandra McWilliams, around 9:00 p.m. Cobbins acknowledged that the defendant never mentioned to the police officers that Cobbins could provide him an alibi. Cobbins said that in August 2003, he was working on a road crew and Serrett drove by and made a gun gesture with his hand to his forehead.

James Bumpus testified that he gave a statement to Investigator McConnell on August 10, 2003, during which he told the investigator that he was on Watson Drive on July 29th which was a lie he had told to help Amber Brant. On cross-examination, Bumpus admitted that Brant did not want to tell the police what she knew for fear of getting arrested so she asked Bumpus to pretend he knew the information she told him first-hand.

James McWilliams testified that he lived on Perry Street next to the defendant's uncle Gregory Cobbins. The afternoon of July 29, 2003, Serrett and the victim arrived at McWilliams house around 2:30 or 3:00 p.m. and Serrett gave McWilliams a beer. A short while later, McWilliams saw the defendant leave with Serrett and the victim. McWilliams saw the defendant again, ten or fifteen minutes later, walking back to the house. On cross-examination, McWilliams admitted that he told Investigator McConnell that he remembered seeing the defendant walking back to the house and Cobbins driving behind him. McWilliams told Investigator McConnell that the

[2] Cobbins lived on the same street as Calandra McWilliams and the defendant.

defendant and Cobbins had been home for over an hour before he heard sirens going down the road.

Wilbur Cobbins testified that he was at his niece's house on Perry Street the afternoon of July 29, 2003, and saw Serrett and the victim arrive around 4:45 p.m. and then leave with the defendant. Wilbur Cobbins said that the defendant returned to the house, walking, between 8:30 and 8:45 p.m followed by Gregory Cobbins. On cross-examination, Wilbur Cobbins admitted that he was back and forth from his house and his niece's house that evening. Wilbur Cobbins disputed that the defendant and Gregory Cobbins had been home over an hour before he heard the sirens.

As a rebuttal witness, the state offered the testimony of Jamiha Keene who testified that on July 29, 2003, the defendant stopped by his apartment at the May Street Apartment complex and tried to borrow his bicycle. Keene would not let the defendant borrow his bicycle so the defendant took off on "Kenny's" bicycle. Keene said it was sometime between 3:00 and 4:00 p.m. when the defendant stopped by.

Jonathan McGee testified that he also lived in the May Street Apartment complex and on July 29, 2003, the defendant stopped by the first time between 4:00 and 5:00 p.m. and asked to borrow his bicycle. When McGee said no, the defendant jumped on someone else's bicycle and took off. McGee saw the defendant again that night, this time about 11:00 or 11:15 p.m., after his daughter's usual bedtime. While McGee was outside his apartment, he saw the defendant "pull the bike up, . . . run upstairs for just a few seconds, run back down, and was gone." On cross-examination, McGee maintained that he was sure these events happened on July 29th.

Based on this evidence, the jury convicted the defendant of first-degree murder and he was sentenced to life imprisonment.

II. ANALYSIS

The defendant raises six issues for our review on appeal. He challenges the denial of his motion to suppress his statement to law enforcement; the state's use of a peremptory challenge on an African-American prospective juror; the under-representation of the African-American race in the jury pool; the denial of his motion to preclude a witness's "prejudicial" testimony; the sufficiency of the convicting evidence; and the denial of his petition for writ of error coram nobis. We will address each of these issues in turn.

A. Motion to Suppress

First, the defendant challenges the admissibility of his statement to police. Specifically, the defendant argues that the trial court erred in denying his motion to suppress his statement to police because he did not know he was being charged with murder until after he had waived his rights and submitted to police questioning.

Testimony at the hearing on the motion to suppress established that the Lawrence County Grand Jury returned an indictment for first-degree murder against the defendant on August 26, 2003. Two days later, on August 28, 2003, the defendant was apprehended and taken to the police department for questioning. Prior to questioning, the defendant was informed of his rights and signed a waiver. Investigator McConnell recalled at the hearing that the defendant never made a reference to wanting to speak to an attorney. At the completion of the interview, Investigator McConnell notified the defendant of the indictment against him and placed the defendant under arrest. According to the defendant, he was told his statement could not be used against him in court and was told he did not need a lawyer. The defendant said that the officers told him he was being questioned because other witnesses had reported that he had been with the victim the day of the shooting. When asked whether, aside from signing the *Miranda* waiver form, he had told the officers he wanted to proceed without an attorney, the defendant responded, "No. If I would, if I would have known then I would have, I would have had an attorney present." Following extensive arguments by both parties and the submission of briefs to the court, the trial court denied the defendant's motion to suppress.

Both the United States and Tennessee Constitutions guarantee an accused the right to counsel upon the state's initiation of adversarial judicial proceedings. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In Tennessee, an arrest warrant, or a preliminary hearing if no arrest warrant is issued, or an indictment or presentment when the charge is initiated by the grand jury, marks the initiation of criminal charges to which the Sixth Amendment right to counsel attaches. *State v. Mitchell*, 593 S.W.2d 280, 286 (Tenn. 1980). When a defendant challenges the admissibility of a statement based upon the infringement of his Sixth Amendment right, the state bears the burden of showing that the defendant made a knowing and voluntary waiver of his right to counsel. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977). In *Patterson v. Illinois*, the United States Supreme Court held that "[s]o long as the accused is made aware of the dangers and disadvantages of self-representation during post[-]indictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is knowing and intelligent." 487 U.S. 285, 300 (1988) (internal quotations omitted); *see also State v. Rollins*, 188 S.W.3d 553, 566 (Tenn. 2006).

When reviewing the trial court's decision on a motion to suppress, this court conducts a de novo review of the trial court's conclusions of law and application of law to facts. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). However, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). Moreover, the prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001).

On appeal, the defendant's argument for suppression is essentially that his Sixth Amendment right to counsel attached on August 26th when the Grand Jury returned an indictment against him. However, he was not made aware of the indictment until after he waived his rights and gave a statement; therefore, he did not make a knowing and voluntary waiver of his Sixth Amendment right to counsel. In rebuttal, the state, relying on *Patterson v. Illinois*, argues that the defendant waived both his Fifth and Sixth Amendment rights to counsel when the police properly executed a *Miranda* admonition and the defendant signed a waiver of rights form before being questioned. The defendant distinguishes *Patterson* by pointing out that in *Patterson* the defendant had been informed that he had been formally indicted prior to the interrogation, and he notes that the Supreme Court did not address the question of whether the accused must be informed of the indictment against him before a post-indictment Sixth Amendment waiver will be valid. In rebuttal, the state asserts that the defendant has failed to show that he was prejudiced by the police officer's failure to inform him of the indictment against him because his statement was not incriminating.

Upon review, we conclude that the trial court properly denied the defendant's motion to suppress. The evidence presented at the hearing on the motion to suppress indicates that the defendant was informed of his *Miranda* rights and signed a waiver of his rights. Investigator McConnell testified that the defendant did not request an attorney at any time and, by its decision, the trial court accredited McConnell's testimony. Additionally, the record indicates that the defendant was aware of the fact that the police officers did not bring him into custody for a casual conversation. By his own testimony, the defendant acknowledged that he was told by the police that he was being questioned because he had been seen with the victim and Serrett the day of the shooting. The defendant also testified that he was handcuffed and taken to the police station in a patrol car. In addition, there is nothing in Tennessee law that requires a police officer to inform a suspect that the Grand Jury has returned an indictment against him before a Sixth Amendment waiver is deemed valid. Furthermore, even if the trial court erred in failing to suppress the statement, the error was harmless because the defendant's statement was not incriminating. Instead, the defendant's statement was a recitation of the events of July 29, 2003, including the defendant's assertion that he did not see the victim after 8:10 p.m. Accordingly, the defendant is not entitled to relief.

B. Peremptory Challenge

Second, the defendant argues that the trial court erred in upholding the state's peremptory challenge of Brenda Reed, one of only three African-Americans in the jury pool and the only African-American on the jury panel. During voir dire, the state challenged Reed because she said she went to church with the defendant's grandmother and/or great grandmother and the defense was planning on calling several of the defendant's relatives as alibi witnesses at trial.[3] The defendant argues that the state's challenge of Reed could only be due to race because Reed assured the parties that she could be a fair and impartial juror given her limited relationship to the defendant.

[3] The jury voir dire is not included in the record on appeal.

Under the Equal Protection Clause of the Fourteenth Amendment, neither the state prosecutor nor the defendant may exercise a peremptory challenge to remove a prospective juror solely on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 89-90 (1986); *see also Georgia v. McCollum*, 505 U.S. 42, 59 (1992). In *Batson v. Kentucky*, the United States Supreme Court established a three-step process for evaluating alleged discrimination in jury selection. First, the opponent of the peremptory challenge must establish a prima facie case of purposeful discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94; *see also Johnson v. California*, 545 U.S. 162, 169 (2005). Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the challenge. *Batson*, 476 U.S. at 97-98. The race-neutral explanation need not be persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Unless purposeful discrimination is inherent in the explanation, the reason offered will be deemed race-neutral. *See id.* Finally, if the proponent provides a race-neutral explanation, the trial court must then determine, from all the circumstances, whether the explanation is a pretext and whether the opponent of the peremptory challenge established purposeful discrimination. *See Batson*, 476 U.S. at 98; *see also Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). If the trial court determines that the proffered reason is merely pretextual and that a racial motive is in fact behind the challenge, the juror may not be excluded. *See State v. Hugueley*, 185 S.W.3d 356, 369 (Tenn. 2006); *Woodson v. Porter Brown Limestone Co., Inc.*, 916 S.W.2d 896, 903 (Tenn. 1996).

The trial court must articulate specific reasons for each of its findings on the record. *Woodson*, 916 S.W.2d at 906. The court should explain whether a prima facie showing of purposeful discrimination has been established, whether a neutral explanation has been given, and "whether the totality of the circumstances support a finding of purposeful discrimination." *Id.* The trial court's findings are to be accorded great deference and not set aside unless clearly erroneous. *Id.*; *State v. Smith*, 893 S.W.2d 908, 914 (Tenn. 1994).

After considering the arguments of both parties, the trial court determined that the state offered a race-neutral reason for excluding Reed. Specifically, the trial court accepted the state's reason that it wished to excuse Reed because she was acquainted with members of the defendant's family.

Upon review, we are unconvinced that the defendant established a prima facie case of purposeful discrimination. Standing alone, the simple fact that the challenged juror was the only African-American member of the jury does not constitute a constitutional violation or show purposeful discrimination. Furthermore, the state's explanation for the challenge of Reed was rational and based on a race-neutral consideration – the juror's acquaintance with members of the defendant's family. Accordingly, we discern no error in the trial court's finding that the state's peremptory challenge of Reed was not discriminatory. This issue is without merit.

C. Under-representation

Third, the defendant argues that the trial court erred in ruling that his race was adequately represented in the jury pool. To begin, we note that it appears the defendant challenged the make-up of the jury pool for the first time in his motion for new trial. In support of his motion for new trial, the defendant presented the affidavit of Debbie Riddle, Lawrence County Chief Deputy Circuit Court Clerk, wherein she said that a jury pool of 141 was summoned for jury duty and ninety-two potential jurors showed up. Riddle testified at the hearing consistently with the information in her affidavit. Additionally, Riddle stated that the jury roll did not have any indication of the race of the prospective jurors, but she believed there were two African-Americans in the pool of 141. The defendant's counsel also swore to an affidavit wherein he said he counted ninety-two prospective jurors in the courtroom, of which five were African-American. Counsel further averred that he later learned two of the individuals were spectators or potential witnesses, leaving three African-American prospective jurors in the jury pool. The defendant lastly offered census data from the year 2000 that showed that the African-American population of Tennessee was 16.4%, the African-American population of Lawrence County was 1.5%, and the African-American population of the surrounding counties ranged from 5.0% to 24.9%.

Article I, section 9 of the Tennessee Constitution guarantees a criminal defendant the right to a jury from "the county in which the crime shall have been committed." *See State v. Upchurch*, 620 S.W.2d 540, 542 (Tenn. Crim. App. 1981). Moreover, a criminal defendant has a constitutional right to a jury drawn from a venire that represents a fair cross-section of the community. *State v. Bell*, 745 S.W.2d 858, 860 (Tenn. 1988) (citing *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975)). In determining whether a jury was properly selected from a fair cross-section of the community, we utilize the three-prong test set forth in *Duren v. Missouri*, which states that the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. 357, 364 (1979)*; see State v. Mann*, 959 S.W.2d 503, 535 (Tenn. 1997) (citing *Duren*, 439 U.S. at 363) (footnote omitted).

The defendant automatically satisfies the first prong in that the United States Supreme Court has recognized African-Americans as a distinctive group in the community. *Mann*, 959 S.W.2d at 535 (citing *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972)). However, the defendant has not satisfied the remaining two prongs. In looking at the census data provided by the defendant, Lawrence County has an African-American population of 1.5%. Therefore, in a pool of 141 prospective jurors, the African-American race would be fairly represented by the inclusion of three African-American prospective jurors. According to defense counsel's own count, there were at least

three African-Americans in the jury pool. Furthermore, the defendant has failed to prove or even allege that there was a systematic exclusion of African-Americans in the jury selection process. The defendant is not entitled to relief on this issue.

D. Prejudicial Testimony

Fourth, the defendant argues that the trial court erred in denying his motion in limine to preclude a witness, Mary Johnson, from testifying concerning a conversation she had with the defendant approximately six days after the shooting. In a hearing prior to trial, defense counsel explained that Johnson had given a statement to police in which she claimed to have asked the defendant "[w]hy did you shoot that girl" and said, "[i]t is all over town that you did it." Defense counsel argued that the question was conclusory and prejudicial. The state asserted that the defendant's initial response to her question, "f-[]-c-k you. It's my sh[]t that come up missing," was incriminating and would be out of context if the jury could not hear the question that elicited such response. The trial court allowed Johnson's testimony with an accompanying limiting instruction to the jury to consider only the defendant's response to Johnson's question as substantive evidence.

The defendant argues that it was improper for the trial court to allow Johnson to speculate or mind-read that the defendant shot the victim. However, Johnson did not testify that she thought the defendant shot the victim. Johnson simply testified to her confrontation with the defendant based on rumors she heard identifying the defendant as the murderer. It was clear from Johnson's testimony that she had no first-hand knowledge of the events surrounding the murder and testified as to her statement only to put the defendant's incriminating response in context.

Upon review, we conclude that the trial court properly allowed testimony regarding Johnson's conversation with the defendant. While not amounting to a confession, the defendant's statement, "It's my s[]it that come up missing," was an acknowledgment that, along with other facts, tended to establish the defendant's guilt. *See Helton v. State*, 547 S.W.2d 564, 567 (Tenn. 1977), *overruled on other grounds by State v. Cabbage*, 571 S.W.2d 832 (Tenn. 1978). Admittedly, Johnson's question itself had no evidentiary value, but without the context of the defendant's response it would have been difficult for the jury to understand. While it may have been error for Johnson to state "it's all over town that you [killed her]," the jury was properly instructed to consider only the defendant's response as substantive evidence. We presume the jury followed the court's instruction absent evidence to the contrary. *See State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). Therefore, the defendant is not entitled to relief.

E. Sufficiency

Fifth, the defendant challenges the sufficiency of the convicting evidence. Specifically, the defendant avers that there was insufficient proof of his identity as the murderer. Upon review, we note the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating

to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

The identity of the offender is an essential element of any crime. *Rice*, 184 S.W.3d at 662 (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). When a defendant's involvement in the offense is circumstantial in nature, "[s]ufficient proof of the perpetrator's identity may be established through circumstantial evidence alone." *Id.* However, the circumstantial evidence

> must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt, and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that he is the one who committed the crime.

State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987).

In the light most favorable to the state, the evidence at trial established that the defendant was with the victim and Brian Serrett the evening of July 29, 2003, and the defendant had given Serrett money to purchase drugs for him. The defendant soon after confronted Serrett at the home of Amber Brant inquiring about his money, then he left with the victim in the victim's car about 8:45 p.m. When he left, the defendant was angry about losing his money and said, "I bet I get my money, or I'll mess somebody up." Shortly before 9:00 p.m., Cynthia Smith and Donna Oliver saw the victim's car on Watson Drive and saw the victim get out of the car and approach their vehicle pleading for help. A young African-American man wearing red and black high top shoes was with the victim. Moments later, Tammy Middleton drove by the victim's car on Watson Drive and saw the victim by her car, shot in the face and bleeding. At the same time, Robert Oliver and Fred Barnett were nearby playing outside. Barnett heard gunshots and Oliver heard sirens, and both boys saw a man run by them coming from the general direction of the crime scene. Oliver recognized the man as the

defendant, and Barnett later picked the defendant out of a photographic lineup, identifying him as the man he saw running that night. Around 9:15 p.m., the defendant appeared again at Amber Brant's home in a different car and with his aunt, Calandra Williams. The defendant told Brant that "he'd messed [her] cousin up, and to bring [her] butt out there and see if he don't pop [her]." A few days after the shooting, Mary Johnson asked the defendant why he had shot the victim, and the defendant's initial response was, "f[]ck you. It was my sh[]t that come up missing," although later in the conversation he denied killing the victim. The police also uncovered a pair of red, black, and white shoes from the defendant, which he admitted to wearing the night the victim was murdered. Cynthia Smith was shown the defendant's shoes at trial and said that his shoes were somewhat like the shoes the male subject was wearing that night, although she could not see white on the subject's shoes.

We are aware that there was some conflicting testimony at trial. In particular, we acknowledge that Calandra McWilliams, the defendant's aunt, and Gregory Cobbins, the defendant's uncle, provided at least some testimony of alibi. However, assessing the credibility of witnesses was the sole province of the jury. The testimony of the defendant's primary alibi witness, Gregory Cobbins, was in conflict with the testimony of Fred Barnett and Robert Oliver, and by its verdict the jury accredited the testimony of Barnett and Oliver. Also, as noted by the defendant, the murder weapon was not recovered and no one actually witnessed the defendant shoot the victim, therefore, much of the evidence against the defendant was circumstantial. Even though circumstantial in nature, the evidence was consistent with the defendant's guilt and inconsistent with his innocence, and we will not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *Reid*, 91 S.W.3d at 277. Accordingly, we conclude the evidence was sufficient to sustain the defendant's conviction.

F. Writ of Error Coram Nobis

Last, the defendant argues that the trial court erred in denying his February 23, 2005, petition for writ of error coram nobis. The writ of error coram nobis is an extraordinary remedy by which the trial court may provide relief from a judgment under narrow and limited circumstances. *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999). The remedy is available by statute to a criminal defendant in Tennessee. *See* Tenn. Code Ann. § 40-26-105. The statute provides, in part:

> Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

Id. Therefore, to establish that he is entitled to a new trial, the defendant must show: (a) the grounds and the nature of the newly discovered evidence, (b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial, (c) that the defendant was without fault in failing to present the newly discovered evidence at the appropriate time, and (d) the relief sought. *State v. Hart*, 911 S.W.2d 371, 374-75 (Tenn. Crim. App. 1995). "As a general rule, subsequently or newly discovered evidence which . . . serves no other purpose than to contradict or impeach the evidence adduced during the course of the trial will not justify the granting of a petition for the writ of error coram nobis when the evidence, if introduced, would not have resulted in a different judgment." *Id.* at 375 (citations omitted). The decision to grant or deny a petition for writ of error coram nobis based on newly discovered evidence lies within the sound discretion of the trial court. *See Teague v. State*, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988), *overruled on other grounds by Mixon*, 983 S.W.2d at 671 n.13; *see also Hart*, 911 S.W.2d at 375.

1. Testimony of Amber Brant

In support of his petition for writ of error coram nobis, the defendant offered the affidavit of Leanne Perry. In her affidavit, Perry claimed that she spoke with Amber Brant on Monday, January 24, 2005, while Brant was waiting to testify at the defendant's trial. According to Perry, Brant told her, "I am waiting to testify so I can go and collect my money for my testimony."

On March 3, 2005, the trial court conducted a hearing wherein evidence was presented on the petition for writ of error coram nobis. Leanne Perry testified at the hearing and explained that she had been in the courthouse on the day that Amber Brant testified and had asked Brant and two of Brant's family members, Shirley and Darnell Richardson, why they were there. According to Perry, Brant said "that she was going to testify. And then when she got off the witness stand, she was going to go get her money." However, Brant did not indicate to Perry any connection between her testimony and the money she was to collect, nor did she indicate that she was giving false testimony for money or for any other reason.

Amber Brant also testified at the hearing and stated that she did not remember seeing Perry that day and did not make a statement to Perry about receiving money for her testimony. Shirley Richardson, Brant's mother, testified that she was with Brant on the day of the trial and did not recall Brant having a conversation with Perry, nor did she personally recall seeing Perry at the courthouse.

2. The Admission of Darnell Richardson

Perry also asserted in her affidavit that on February 3, 2005, she met with Darnell Richardson to whom she gave $500 to buy drugs. Perry claimed that while the two were smoking marijuana and crack cocaine, Richardson told her that he shot the victim and that he saw her face when he slept. He said that Brant was with him when he killed the victim and "we had to do what we had to do." At the hearing, Perry clarified that Richardson admitted to killing the victim, but he did not go into details. Perry stated that Richardson said he killed the victim, but he did not say that he shot her.

On cross-examination, Perry admitted that she had been recently arrested and recently admitted to a mental hospital. Perry did not deny that she talked to someone from defense counsel's office about finding out information regarding the case prior to her encounter with Richardson. Perry also did not deny that she had hoped defense counsel would help her with a probation matter and custody dispute.

Darnell Richardson testified at the hearing and denied making a statement to Perry about killing the victim. He denied going to Perry's home or buying drugs for her and denied having any first-hand knowledge of or involvement in the victim's death. Richardson also stated that he was not at the courthouse during the defendant's trial. On cross-examination, Richardson testified that he was home with his fiancée and children the night the victim was killed. The court also asked several questions of Richardson regarding his appearance.

After considering the evidence presented at the hearing, the trial court made the following comments and observations:

> [T]he reason[] the Court asked several questions of Mr. Darnell Richardson about his age, weight, and size, and height was to show that his appearance is considerably different in age, height - - maybe not weight - - but also in face hair, head hair, various other appearance factors, that makes him look considerably different, even though of the same gender and race as the defendant . . . .
>
> The key testimony in the trial, when you get right down to it, involved essentially two things: When did the shooting happen? And we heard from all of these various witnesses that drove by and may have seen conflicting things, but they were consistent in it happening within a three- to five-minute window . . . .
>
> And the other thing that was important was that [the defendant] was seen by these two boys, playing in that area, running from the scene and from a direction far away from where his uncle claimed he was, during this same three- to five-minute window.
>
> I think, if the Court had heard - - in other words, if the jury had heard everything they did at the trial, and in addition thereto, had also heard what this Court has heard today - - that being the testimony of Leanne [Perry] and the testimony of Darnell Richardson and the additional testimony of Amber Brant about any alleged statements about money - - that those two critical issues would have still come out the same way; that the defendant . . . had a motive; the defendant . . . was running from the scene of the shooting, and that all of that occurred in this very small window of time when his only real alibi was the uncle.

> He was with his aunt in the car a few minutes after the shooting occurred, but that could have easily have been accomplished in a way consistent with what the two boys testified about seeing the defendant running from the scene.
>
> The only thing the two boys conflicted with, specifically, and the only real alibi he had for the critical time, was from the uncle. And the jury obviously believed the two boys and disbelieved the uncle.
>
> And I don't see how what the Court has heard today, even if admissible, would have influenced the jury's ultimate decision.

In this case, we cannot conclude that the trial court abused its discretion in denying the defendant's petition for writ of error coram nobis. In the exercise of its discretion, the trial court assessed the credibility of the witnesses who testified at the hearing on the petition. *Hart*, 911 S.W.2d at 375. We agree with the trial court that the newly discovered evidence, the testimony of Leanne Perry, would not have changed the outcome of the trial if heard by the jury.

III. CONCLUSION

Based on the aforementioned reasoning and authorities, we affirm the judgment of the Lawrence County Circuit Court.

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J.C. McLIN, JUDGE